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SUBJECT: CANADA: FEDERAL COURT EXPANDS TERROR WIRETAP POWERS

REF: OTTAWA 747

11. (SBU) Summary: Canada's Federal Court has approved the authorization, on a case-by-case basis, of warrants permitting the Canadian Security Intelligence Service (CSIS) to track terrorism suspects electronically overseas, in addition to existing authority to do so domestically. The decision significantly expands the ability of Canadian security agencies to monitor suspected "homegrown" extremists. Canadian national security officials welcomed the decision, which they had long sought. However, this decision does not remove the dilemma of how far the government should go in publicly revealing sources and methods to secure convictions in future criminal cases. End summary.

EXPANDED ELECTRONIC SURVEILLANCE

12. (U) On October 6, Federal Court Justice Richard Mosley publicly released a heavily redacted 41-page explanation of his decision to allow CSIS to track terrorism suspects electronically overseas. Justice Mosley had originally granted CSIS specific wiretap warrants on November 27, 2008 to monitor two (unnamed) Canadian individuals deemed a threat to national security, authorizing the use of "intrusive investigative techniques and information collection at locations within Canada" for one year. On January 24, CSIS had applied to the Court on an "urgent" basis for an additional warrant against the same two individuals to allow CSIS to track the suspects abroad with respect to "threat activities which," the government argued, "the two individuals would engage in while travelling outside of Canada."

13. (U) CSIS's mandate limits the agency to surveillance within Canada. The Communications Security Establishment (CSE) -- Canada's signals intelligence agency -- has the capacity to intercept foreign communications, but Canadian law prohibits it from monitoring the communications of Canadians. In October 2007, the Federal Court had rejected a similar CSIS application to enlist CSE's aid listening in on nine Canadian terrorism suspects overseas. The Court ruled at that time that it lacked jurisdiction to authorize "intrusive" CSIS investigations outside Canada, and that CSE monitoring could potentially violate foreign laws unless CSIS first obtained permission of the countries where the surveillance would take place.

A FRESH LOOK AT THE JURISDICTION ISSUE

14. (U) In its January 2009 application, CSIS had asked the Court to revisit the jurisdiction issue. CSIS argued that a warrant to intercept data would be executed entirely in Canada and that, therefore, issues of the Court's jurisdiction did not arise. Further, CSIS argued that CSE's technical assistance -- pursuant to a judicial warrant -- did not constitute intelligence gathering for its own purposes, as data would be passed to CSIS for analysis.

15. (U) Justice Mosley agreed with CSIS, citing "exigent" circumstances to approve the warrant. He noted that "individuals

who pose a threat to the security of Canada may move easily and rapidly from one country to another and maintain lines of communication with others of like mind," adding that "information which may be crucial to prevent or disrupt the threats may be unavailable to the security agencies of this country if they lack the means to follow those lines of communication." Justice Mosley granted the warrant in January for a three month period, and renewed it for a further nine months in April.

16. (U) Justice Mosley also ruled that CSE could monitor foreign communications "at the locations within Canada where the calls will be acquired, listened to and recorded." As the technology would be "controlled from within Canada," he found that such surveillance would not break foreign law. However, he decreed that the Federal Court will continue to review wiretap warrants on a case-by-case basis.

A VALUABLE TOOL -----

17. (U) The Canadian intelligence community had long sought the expanded powers, consistently maintaining that Canada's Cold War-era wiretap laws compromised its ability to monitor suspects in real time. Previous to Justice Mosley's ruling, CSIS had to ask allies to conduct electronic surveillance on CSIS's behalf or to request that Canadian telecom companies voluntarily provide international call records when Canadian terror suspects left the country. A CSIS spokesperson publicly welcomed the "important ruling," noting that it had recognized "that security threats are global and highly mobile . . . and that countering those threats requires a new approach."

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CANADA A TARGET FOR HOMEGROWN EXTREMISM? -----

18. (U) Separately on October 6, Canada also released a November 2008 report by the Integrated Threat Assessment Centre (ITAC) entitled "Canada: Bi-Annual Update on the Threat from Terrorists and Extremists," under the Access to Information Act. The report asserted that, although no terrorist incidents had occurred in Canada, individuals and al-Qaeda-inspired groups "have demonstrated both the intent and capability to target critical infrastructure in Canada." Of particular concern, it cited homegrown extremists "who have adopted the al-Qaeda mindset" and who may travel overseas for paramilitary and explosives training. In addition to al-Qaeda, ITAC cited Hezbollah and the Liberation Tigers of Tamil Eelam (LTTE) as active in Canada, although primarily engaged in fundraising.

19. (SBU) Comment: The Canadian judiciary had recently handed the government a series of defeats in the realm of national security (reftel). In contrast, Justice Mosley's decision gives Canadian law enforcement and security agencies a valuable new tool to conduct domestic terrorist investigations more thoroughly and enhances the ability of CSIS and CSE to cooperate more effectively. Senior national security officials have privately commented to emboffs that they are greatly encouraged by Justice Mosley's decision itself, but also by the Court's reasoning in coming to the decision. They praised in particular the Justice's acknowledgement that the transnational nature of modern terrorism requires updated tools for government. Nonetheless, senior officials have cautioned that the increasing "judicialization" of national security will continue to exert pressure on the government to release intelligence information into evidence to win convictions against terrorists in the future. The most recent decision will give the government more intelligence on terrorism suspects, but it does not remove the dilemma of how far the government should go in publicly revealing sources and methods to secure convictions.

JACOBSON